UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Donna Scheibler; and
William Schiebler, her husband,
Appellants.

v.

Highmark Blue Shield,
Appellee.

Re: Docket No. 05-1717
Scheibler vs. Highmark Blue Shield
D.C. Civil No. 04-cv-1928

Dear Counsel:

This will advise you that the within appeal will be submitted to a panel of this Court for possible dismissal due to a jurisdictional defect.

It appears that this Court lacks jurisdiction for the reason that the notice of appeal is taken from an order which is not final within the meaning of 28 U.S.C. section 1291 and has not been certified pursuant to Rule 54(b), Fed.R.Civ. P.

The Court DIRECTS that all parties respond IN WRITING (original and 3 copies with a certificate of service). The responses are to be RECEIVED in the Clerk's Office not later than 3/18/05. The responses may be in either pleading or informal letter form.

If counsel fail to respond, the matter will be submitted to the Court without the requested response(s). You are advised that failure to respond may result in the imposition of sanctions by the

Court. Parties who do not intend to participate in the appeal are directed to so notify the Court in writing (original and 3 copies with a certificate of service).

This notice will not stay the time for making any filings or submissions required by the rules of this Court nor will it stay entry of a briefing schedule.

Very truly yours,

/s/ Marcia M. Waldron
Clerk

By: Kelly A. Glaum
Case Managing Attorney

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 05-1717 & 05-2527

(Western District of PA Civil No. 04-cv-01928)

Donna Scheibler; and
William Schiebler, her husband,
Appellants.

v.

Highmark Blue Shield,
Appellee.

SLOVITER, FUENTES, NYGAARD, Circuit Judges.

1. Clerk's Submission for possible dismissal due to jurisdictional defect.
2. Response by Appellee, Highmark Blue Shield
3. Response by Appellants, Donna Scheibler and William Scheibler
4. Response by Appellants, Donna Scheibler and William Scheibler in No. 05-2527

Tonya Wyche, Case Manager

ORDER

The orders appealed do not end the litigation as ot all claims and all parties. Since no entry of final judgment has been made under Fed.R.Civ.P. 54(b) and since the orders appealed do not "end the litigation on the merits and leave nothing for the court to do but execute final judgment," Appellant's appeals are not final or appealable at this time under 28 U.S.C. § 1291. Quakenbush v. AllState Ins. Co., 517 U.S. 706, 712 (1996).

The orders appealed also have not been certified as immediately appealable under 28 U.S.C. § 1292(b) nor do they fall under the collateral order exception to the final judgment rule. See Digital Equip. Corp v. Desktop Direct, Inc., 511 U.S. 863, 867-68 (1994). Appellant's appeals are therefore dismissed for lack of appellate jurisdiction.

By the Court,

/s/ Julio M. Fuentes
Circuit Judge

Dated: July 26, 2005

JUDGMENTS TO BE REVIEWED (R.12.4)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 05-3569
(Western District of PA - Civil No. 04-cv-01928)

Donna Scheibler; and
William Schiebler, her husband,
Appellants,

v.

Highmark Blue Shield,
Appellee.

RENDELL, FISHER, and VAN ANTWERPEN,
Circuit Judges.

Petition by Donna Scheibler and William Scheibler for *Writ of Mandamus* to United States District Court for the Western District of Pennsylvania.

/s/ Rebecca L. Simon, Case Manager

ORDER

The foregoing petition by Donna Scheibler and William Scheibler for *Writ of Mandamus* is DENIED.

By the Court:

/s/ Franklin S. Van Antwerpen, Circuit Judge.

Dated: August 18, 2005

JUDGMENTS TO BE REVIEWED (R.12.4)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 05-1717 & 05-2527
(Western District of PA - Civil No. 04-cv-01928)

Donna Scheibler; and
William Schiebler, her husband,
Appellants,

v.

Highmark Blue Shield,
Appellee.

SUR PETITION FOR REHEARING *EN BANC*

Present: SCIRICA, Chief Judge, SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and NYGAARD*, Circuit Judges

Judge Nygaard's vote is limited to panel rehearing only.

The Petition for Rehearing filed by the Appellants in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and by the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes, Circuit Judge.

Dated: September 19, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER, et al.,

Plaintiff,

vs.

HIGHMARK BLUE SHIELD,

Defendant.

Civil Action

No. 04-1928

Transcript of proceedings on March 10, 2005, United States District Court, Pittsburgh, Pennsylvania, before Thomas M. Hardiman, District Judge

APPEARANCES:

For the Plaintiff: Mary Ellen Chajkowski, Esq.

For the Defendant: Brian Fagan, Esq.

Court Reporter: Richard T. Ford, RMR, CRR
1023-B U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-0802

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

(Proceedings held in open court; March 10, 2005).

THE COURT: Would counsel enter their appearance, please.

MS. CHAJKOWSKI: My name is Mary Ellen Chajkowski, I represent the Scheiblers at the Scheiblers versus Highmark civil case.

MR. FAGAN: Brian Fagan, F-A-G-A-N, on behalf of Highmark.

THE COURT: I just wanted to bring you in here to explain what's going on in this case because there have been a flurry of motions. Obviously I dismissed the bad faith count that you filed, Ms. Chajkowski. The reason I did was the Third Circuit in the Barber case held that the Pennsylvania bad faith statute is preempted by ERISA. So that count is -- cannot stand by any stretch of the imagination.

Now, if you believe that I have made that decision in error, you can take that up with the circuit, but you can't take it up with the circuit now while the case is still pending. There are other counts in your case. So we are going to have to adjudicate the whole case; then if you are unhappy with the result, then you can take that issue up on appeal.

But I would caution you that you need to take a careful look at the Barber case before you do that or else you might be putting yourself in some degree of jeopardy with the

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circuit because Barber clearly held that that statute is, the bad faith statute, is preempted by ERISA. It is an issue that has been percolating for a few years in the district courts. There were a variety of decisions by the district courts. Some held that it was not preempted; others held that it was preempted. But the circuit just answered that question within the last year.

MS. CHAJKOWSKI: Your Honor, if that were so, if you wanted to leave it at that position where you keep out the bad faith, I'd like to ask you to consider the things that I raised in the petition for reconsideration, which are: On their motion to dismiss they moved to dismiss based on ERISA preemption. Yet when they filed their answers and responses to the petition for reconsideration and the complaint, they are denying ERISA liability.

Also, even before they made responses, in my petition for reconsideration I raised some factual questions. The first being that the plan may not be a qualified plan. ERISA may not apply here. If ERISA does not apply, then the bad faith statute would apply.

My concern was --

THE COURT: If ERISA doesn't apply, what is the federal question presented in your case?

MS. CHAJKOWSKI: Either antitrust or securities or both.

THE COURT: Has antitrust or securities been pleaded?

MS. CHAJKOWSKI: Not yet, but the fact was I wanted to plead the two obvious things first to see where it led, and the fact is, Your Honor, Highmark owns a dental subsidiary, it is wholly owned by Highmark, and they brought in a billion dollars in income in 2004, and the fact is they are blanket denials. If they don't include due process, if they don't include the specificity required under the regulations of ERISA, and if ERISA doesn't apply, then they are, you know, across the board denying dental surgery.

In this case this was a medical qualified request and it was not -- their answer in the letter they wrote to my client May 17th said that their appeal was through ERISA. In fact, the responses say they are denying ERISA. And the documents that they provided in terms of a plan, it was not a plan, it was a draft, Your Honor --

THE COURT: So you are saying they can't on the one hand say ERISA doesn't apply and then at the same time say ERISA preempts the bad faith.

MS. CHAJKOWSKI: Correct, Your Honor.

THE COURT: Let me hear from Mr. Fagan on that.

MR. FAGAN: Two things. The first thing, the Plaintiffs themselves established that this is an ERISA plan and it's evident on the facts of this case. They say it's an

employee benefits plan.

THE COURT: So you don't deny it is an ERISA plan?

MR. FAGAN: Not at all. It's definitely an ERISA plan. It's a plan provided to Ms. Chajkowski's clients through Donna Scheibler's employer. So it's an ERISA plan.

I think the confusion comes up, we've denied liability under ERISA and also deny any liability for any state law causes of action because they're preempted by ERISA. But the issues of our liability remain, and they remain --

THE COURT: The ERISA case will go on.

MR. FAGAN: Certainly.

THE COURT: But the bad faith case won't go on because of the Barber case.

MR. FAGAN: Correct. Simply by denying our liability for the ERISA claim doesn't -- we haven't won the case.

THE COURT: They are not saying -- he has just represented on the record that it is an ERISA case, it is an ERISA plan your client has rights under. So there is federal question jurisdiction.

MS. CHAJKOWSKI: Your Honor, in the pleading when they filed answers to the complaint they denied the specific language under ERISA, and I pointed that out in my reply to their response.

And also, Your Honor, if they didn't do the thing

under ERISA, if they didn't give a written notice with specificity to be understood by the participants that it provides an appeal process, the document he is referring to has no table of contents, no index, pages are not numbered, and in going through every page I could not find the appeal process or the procedure for written notice.

The Scheiblers didn't get written notice --

THE COURT: All of that goes to the merits of your case, which you will have discovery, you will take depositions, then we will adjudicate the case either on summary judgment or at trial. So you can continue to go forward with that.

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MS. CHAJKOWSKI: Your Honor, could I ask one other thing? Could you remove at least the "with prejudice" because the "with prejudice" indicates that it was either litigated or on the merits, and neither happened. There was no litigation on the issue of --

THE COURT: On the bad faith?

MS. CHAJKOWSKI: Yes, Your Honor.

THE COURT: It is dismissed with prejudice, meaning that the bad faith claim, you cannot state a claim for bad faith because ERISA preempts it. So it has to be with prejudice. If I said "without prejudice," then you could just refile it again. But you can't file it again because the Third Circuit has said no.

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If you think I'm misreading the Barber opinion, then you can take that up with the circuit at the end of this case, but you are going to have to do that then, not now. So I will deny the motion for reconsideration.

MS. CHAJKOWSKI: Do you have any timetable? My client is concerned with the time factor.

THE COURT: We can try this case as quickly as you two can get the case ready to go. We can try it in August, September, whenever you're ready.

MS. CHAJKOWSKI: So August would be the earliest that it can be tried?

THE COURT: If there is some reason to try it sooner and you are both ready, we can maybe try it in June or July.

MS. CHAJKOWSKI: My client would like that, Your Honor. Further, with leave to amend the complaint, in your -- the information that's on the Internet, it says at some point before discovery is concluded.

THE COURT: You want leave to amend?

MS. CHAJKOWSKI: Yes.

THE COURT: How much time do you need?

MS. CHAJKOWSKI: 30 days.

THE COURT: All right. I will give you 30 days leave to amend, but you need to realize, you're saying mutually contradictory things. You are saying you are going

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to file an amended complaint within 30 days and then you are telling me you want to go to trial very quickly. Those two things are inconsistent because they have a right to read your complaint, respond to your complaint, take discovery. So I will give you the 30 days to amend, but then you are looking at a trial August, September at the very earliest.

MS. CHAJKOWSKI: If I choose not to amend at this time, then we would proceed to discovery on the ERISA issue; and then if this is not an ERISA qualified plan, then what happens to the state claim of bad faith?

THE COURT: The state bad faith claim is gone. It's dead on arrival because it's an ERISA plan. He has admitted, your adversary has admitted in open court on the record this is an ERISA plan. So I am not going to be persuaded by any arguments if he comes in here either orally or in writing telling me it is not an ERISA plan. He has just admitted it is.

MS. CHAJKOWSKI: Your Honor, he does that in the statement, but that's not what they wrote in their pleadings.

MR. FAGAN: That is not exactly true. We just denied liability.

THE COURT: You said that it's a plan, but you have denied that you are liable under the plan.

MR. FAGAN: Correct.

THE COURT: That's the way I read their answer.

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MR. FAGAN: If we did something wrong, the Plaintiffs still have the opportunity to prove it in trial.

THE COURT: All right. So do you want leave to amend or not?

MS. CHAJKOWSKI: Well then you are saying we can go to trial in June without an amendment --

THE COURT: If you don't amend, if it's a simple case without 10 or 20 depositions, if you need three or four depositions, then I could try to do the case in June.

MS. CHAJKOWSKI: I need time to consider whether I should amend now or later then. But, Your Honor, with all due respect, I think there are material questions of fact that would preclude dismissal, and also the "with prejudice" aspect was very prejudicial to the due process of my client. And the Court does have a constitutional role in the enforcement of ERISA. There was no --

THE COURT: The Court has a constitutional role?

MS. CHAJKOWSKI: Yes, Your Honor.

THE COURT: To do what the Third Circuit says. Lawyers have a constitutional role to read Third Circuit cases and not file pleadings that are directly contrary to controlling law or else they risk Rule 11 sanctions. That's why I brought you both in here to try to make clear before any of you do anything that might get you sanctioned by Rule 11 to be very careful to read the controlling law of the circuit.

Because it doesn't matter what I think regarding ERISA preemption.

What matters is the Third Circuit has said in the Barber case that state law for bad faith insurance is preempted by ERISA. And due process, material facts, et cetera, none of that have anything to do with the fact that the Third Circuit has clearly held that it is preempted. That means you can't get out of the starting gate. You can't file a Pennsylvania bad faith claim in an ERISA case. And your adversary has conceded this is an ERISA plan. So for that reason I have to deny the motion for reconsideration.

Your exceptions are on the record; and if you disagree with anything that I have done in this case, you can appeal it after the case is over. But, again, I would ask you not to appeal it in the middle of the case because that's another thing that could get you hit with a Rule 11 sanction. You don't file an interlocutory appeal in the middle of a case. You have to wait until the case is over. All right?

MS. CHAJKOWSKI: Thank you, Your Honor.

(Record closed).

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C E R T I F I C A T E

I, Richard T. Ford, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Richard T. Ford

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER, et al.,

Plaintiff,

vs.

HIGHMARK BLUE SHIELD,

Defendant.

Civil Action

No. 04-1928

Transcript of proceedings on April 25, 2005, United States District Court, Pittsburgh, Pennsylvania, before Thomas M. Hardiman, District Judge

APPEARANCES:

For the Plaintiffs: Mary Ellen Chajkowski, Esq.

For the Defendant: Brian Fagan, Esq.

Court Reporter: Richard T. Ford, RMR, CRR
1023-B U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-0802

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

(Proceedings of April 25, 2005; in chambers).

(Counsel present via telephone).

THE COURT: Good afternoon, folks.

MR. FAGAN: Good afternoon, Your Honor.

MS. CHAJKOWSKI: Hello.

THE COURT: We have Ms. Chajkowski and Mr. Fagan.

MR. FAGAN: Yes.

THE COURT: Okay. I received today a copy of Plaintiffs' petition for reconsideration. I asked to have this telephonic status conference as a result of this, and I have the Court Reporter in chambers right now transcribing this telephonic conference.

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I guess I am still a little bit confused, Ms. Chajkowski, as to the procedural posture of this case. I indicated last time that you were here that your appeal to the Court of Appeals for the Third Circuit was improper because it was an interlocutory appeal and that if you think I made a mistake in finding that the Pennsylvania bad faith statute is preempted by ERISA, as held by the Court of Appeals in the case of Barber versus UNUM, that you are certainly free to take that issue up to the Circuit after your case was concluded.

But your case is still pending here and yet at the same time you are seeking appellate review. So for that reason I denied your petition for an extension of time to

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amend the complaint because you had asked me to wait until the Court of Appeals ruled on your appeal, and I didn't think it would be appropriate to reward your client for something that was done improperly as a procedural matter.

Now, I am always willing to give people time to amend a complaint because amendments to complaints are to be freely given, but I don't want to prejudice the Defendant based upon what is, in my mind, plainly an improper appeal.

So would you respond to that, Ms. Chajkowski.

MS. CHAJKOWSKI: Well, I think the appeal speaks for itself. There are constitutional reasons and Third Circuit cases regarding fiduciary duty that were not considered in the decision to dismiss the bad faith.

I am trying to hold on to the bad faith for my client because they -- it would not be taxable, where if I go into another federal statute at this time and get the same relief, they would be faced with all kinds of taxes and other things and it would take a number of years.

The family has been distressed, as I have tried to include in the pleadings, by the prolonged nature of this and I believe that my pleadings speak for themselves. I would like to hear what the Defendant has to say to the pleadings.

THE COURT: One of the things that is prolonging this is you have taken this inappropriate appeal. I know you want to hold onto the bad faith claim and I know that you want

to ask the Court of Appeals to reverse my decision regarding the bad faith claim, and that's fine, I encourage you to do that if that's what you wish to do, but you can't do it until a final order is entered in this case.

MS. CHAJKOWSKI: Your Honor, there are reasons for interlocutory appeal, and prejudice to the Plaintiff is one of them. And when you eviscerate the bad faith claim, you basically limit what can be discovered and what can be introduced as evidence. So you handicap my clients from the beginning. I think that's been pretty well set forth in my pleadings. I still haven't heard what the Defendant has to say.

THE COURT: Well, Ms. Chajkowski, I guess I want to make clear on the record that to the extent you're complaining to anybody about the protracted nature of the proceedings, that's going to be caused by this appeal. Because, you see, I am not going to do anything with your case here until the Court of Appeals rules on your appeal. I assume that they are just going to send it back to me saying that they have no jurisdiction because I haven't even entered a final order.

So I want to make sure you're aware that the delay is caused by that appeal. Because I can't allow you to litigate a case here in front of me while at the same time you're pursuing an appeal to the Circuit. Do you understand that?

MS. CHAJKOWSKI: Your Honor, this in this petition

for reconsideration, I raised the issue of subject matter jurisdiction, and that issue can be raised any time, even after a final verdict. Would it not make sense with judicial economy to have all the cards on the table with the Rule 26 enforcement before we go anywhere? And why has it been delayed all these months?

THE COURT: Because I can't even have a case management conference -- you see, we don't begin discovery until there is a complaint and an answer. There's been no answer filed.

MS. CHAJKOWSKI: There was an answer filed, Your Honor.

MR. FAGAN: Your Honor, there was an answer filed on behalf of Defendants.

THE COURT: Well, but then the appeal --

MR. FAGAN: I think we have been held up by these appeals and these other numerous motions filed on behalf of Plaintiffs that have prevented the normal process that I think we would get into with Rule 26 disclosures and the initial status conference.

THE COURT: Ms. Chajkowski, the bottom line here is that district courts and appellate courts don't hear a case at the same time. Either I have jurisdiction or they have jurisdiction.

MS. CHAJKOWSKI: That was why I asked that you

permit the Plaintiff to amend after we hear from the Third Circuit. Basically we're asking the Third Circuit to review a decision that was made in November. Every free citizen in the Third Circuit, whether it's health insurance or a contract for disability, as there was in Barber -- and I don't see that the Third Circuit would delay that because there may be numerous people who are disadvantaged because the reading you have of Barber would be different than the Third Circuit. I would assume they would take that under review in a timely manner for the benefit of all the public.

I think this case with Scheibler presents legal issues that merit appellate review so that the state and the insurer can go on and do business in an ordinary good faith manner.

THE COURT: All right. Well, you've made it clear that you want to pursue this appeal at this time, and I am not going to tell you you can't. I have already told you my view of the matter regarding the fact that it seems to me to be interlocutory and not appropriate, but obviously you disagree with that and that's fine.

So go ahead and pursue your appeal, but in the meantime I am not going to entertain any action in this case while you are pursuing your appeal. I am going to deny this petition for reconsideration; and if the Plaintiffs or the Defendant file any motions in front of me, whether they relate

to discovery or Rule 26 or anything, I'm going to reject them out of hand because this case is now with the Court of Appeals. And until the Court of Appeals sends it back down to me, I'm not going to entertain any motions by either side.

MS. CHAJKOWSKI: Your Honor, do you understand by doing that you're continuing the pattern that I laid out in Paragraph 9 because the Defendant would have been, under your order in February, they would have been obligated to -- it was your January order that said within so many days they reply to the petition, so the Court is taking action again before the Defendant responds to the allegations put forward in the petition for reconsideration.

THE COURT: Well --

MR. FAGAN: I am actually confused, Your Honor, as to what we haven't responded to, to tell you the truth.

MS. CHAJKOWSKI: Look at Paragraph 9 of the document that was just filed on Friday.

THE COURT: Paragraph 9 of Plaintiffs' --

MS. CHAJKOWSKI: I am sorry, Paragraph 11. There are a number of times where, before the due date for the Defendant to respond, the Court intervened with an order, and that would happen again here.

The first thing the Plaintiff asked for was to have the Court permit the Defendant to give an answer to that petition. So you are calling to tell me you are going to file

an order again without an answer from the Defendant? Is that what you're telling me?

THE COURT: I am reading Paragraph 11 right now.

Well, I guess there are a lot of things I could say about Paragraph 11, I will just go through point-by-point I guess would be the best way to do it.

The first statement that Plaintiffs' cause of action has been inequitably handicapped and prejudiced by a series of material sua sponte court actions and omissions does not appear to me to be a correct statement at all.

Paragraph A indicates the complaint was filed on December 23, 2004. Then it says, no enforcement of Rule 26 disclosures to date.

Rule 26 disclosures are not implicated upon the filing of the complaint, so I am confused as to why that statement is in Paragraph A.

Paragraph B says that the Defendant accepted service on January 3, 2005, which is common after the complaint is filed, the Defendant accepted service.

Ten days later, as reflected in Paragraph C, the Defendant filed a motion to dismiss on January 13, 2005.

The very next day, as reflected in Paragraph D, on January 14, 2005, this Court ordered the parties to submit to its motions rules. I agree with that, at least that comports with my recollection.

Then on January 28, 2005, the Plaintiffs filed their opposition in response and the motion to deny. I don't know what the motion to deny is. That's not --

MS. CHAJKOWSKI: Deny the motion to dismiss.

THE COURT: That's not a form of pleading that I have -- that I am familiar with. But I understand that it says it was an opposition in response, and I did take that pleading to be Plaintiffs' opposition to the motion to dismiss saying that ERISA did not preempt the bad faith claim.

Next, on February 1, 2005, it says, District Court granted dismissal before response time lapsed. I am not sure what that refers to.

MS. CHAJKOWSKI: Well, if you go to your order for the motion -- the order on motions practice, you mentioned the reply date and you say a reply brief must be submitted within ten days. And sur-reply briefs are not to be filed without leave of Court. The fact is, after we opposed their motion to dismiss, I filed a -- I mean, you didn't permit them time to respond to the things I raised in my response. So that's why I mean sua sponte, it's sort of like the time hadn't passed for them to even file their response.

THE COURT: Is that something that was objected to by counsel, Mr. Fagan? Did you have any objection to my not allowing you time to file a reply brief?

MR. FAGAN: No. And I think it would have been a

sur-reply on our part, I believe, and we didn't seek leave for that and I don't think the Court was -- or we were required to file one. We didn't ask to. So it's a non-issue.

THE COURT: Well, it wouldn't have been a sur-reply because you filed the initial brief, then Ms. Chajkowski filed a response brief, and then --

MR. FAGAN: Well, a reply I guess.

THE COURT: Right.

MR. FAGAN: I don't think we were required to even file the reply to her response.

THE COURT: All right.

MS. CHAJKOWSKI: Your Honor, I object to that because when a party chooses not to -- first of all, the response brief raised legal issues, Third Circuit and United States Supreme Court cases that were not considered in the briefs that were filed to dismiss, okay, and so basically they raised certain issues, we responded to what they raised and also gave other authority on Third Circuit and above that would have applied to this case.

If they chose not to reply to that, it would have been, in my view, better for the Court to wait for the permissible response time before they act because a non-reply is a reply, it says, we have no legal arguments to rebut what you say. But when the Court intervened before the time elapses, then it can be inferred that they could come back at

some point later -- just like subject matter jurisdiction, you could raise that any time.

But the fact is the Court did act and also you acted -- by acting before they had an opportunity to reply, you disadvantaged my clients because the legal issues that we raised should have been considered by the Court.

THE COURT: Just so the record is clear, Mr. Fagan, am I clear in understanding you have no objection to the fact that you didn't have time to file a reply?

MR. FAGAN: That's correct, because our position was simply very clear, that Barber was a simple matter of whether or not the Pennsylvania bad faith statute was preempted, that's the only thing we moved to dismiss. We set forth our reasons in our motion to dismiss and supporting brief, and we left it at that.

THE COURT: I want to state for the record that I disagree with Ms. Chajkowski's statement that I acted sua sponte. Sua sponte means on the Court's own initiative, and I did not enter the order granting the motion to dismiss on my own initiative. Rather, there was a motion filed by Mr. Fagan on behalf of his client, there was a response filed by Ms. Chajkowski on behalf of her client.

I take very seriously my obligation to be timely and current with my work so that litigants don't have to wait extended periods of time to have their day in court. The

issue seemed to me then to be quite clear-cut, that the Court of Appeals had spoken in the Barber case and it was quite a clear decision for me, and that's why I granted the motion to dismiss.

On Paragraph G -- in Paragraph G, there's a statement that on February 11, 2005, Plaintiff filed a petition for reconsideration and to vacate.

On February 15, 2005, the Court ordered Defendant to respond to that motion by February 24, 2005.

On February 16, 2005, Defendant filed an answer and denied that it is an ERISA insurer, according to what Ms. Chajkowski wrote here. I think there's a dispute between the parties that I remember from the last time we were together in court, the Plaintiffs are insisting that the Defendant denies that it is an ERISA insurer; the Defendant claims -- admits that it's an ERISA insurer, but asserts that the Pennsylvania bad faith statute is preempted by ERISA.

Do I correctly state your respective positions on that?

MR. FAGAN: On behalf of Highmark, let us clarify that in our answer we denied, as stated in the Plaintiffs' complaint, that Highmark is an employee benefits plan insurer. That's the way they characterized Highmark in their pleading. We denied it as stated because Highmark doesn't consider itself an employee benefits plan insurer.

As we previously stated in our answer to Paragraph 5, we admitted that Ms. Scheibler selected a health -- selected a health care coverage provided by Highmark pursuant to a health care contract between Plaintiff's employer and Highmark. We're kind of getting into semantics here, but I don't really think it matters really. It comes down to the fact that we agree that this is an ERISA plan and should be covered by the ERISA statute, and the Barber court says that the Pennsylvania bad faith statute is preempted.

THE COURT: All right. The next line says --

MS. CHAJKOWSKI: Your Honor, before you go on, I had something to say to that.

THE COURT: Okay, go ahead.

MS. CHAJKOWSKI: They did not only deny the paragraph that said they were a plan insurer, they denied four paragraphs that related to ERISA language. One of them said that as part of their duty, it was their duty by the Department of Labor regulations in the Black & Decker case to inform the insured what their benefits are, what is covered, what is not covered.

And in the case of Mr. Scheibler, they covered his pre-op, post-op, hyperbaric treatments, which he had done shortly after his physician made the request for coverage, anticipating that the insurance would cover it. Also, in their plan there are -- there was a statement in that

physician's letter that if the work was not done, they were jeopardizing the integrity to the jaw bone.

And the insurer does cover certain appliances and things that would have been put into his mouth after the surgery. So it was like they created a gap with the surgery only.

They also paid for the ambulance.

And we learned they had certain subsidiaries that they haven't disclosed, they haven't filed any disclosure statements of corporate interests. And it looks like they paid some of their entities in full and, you know, then they are not clear about why they deny other coverages.

So when you say that you deny being a plan insurer, but you admit the contract, Your Honor, any time a party pleads their duty according to contract, they are obligated to attach a copy of the contract, especially if it's 53 pages. Could they explain why they haven't done that yet?

THE COURT: All right. The next line says that --

MS. CHAJKOWSKI: Your Honor, they don't have to tell why they haven't attached the contract?

THE COURT: That's not an issue for what we're focused on in this call. I'm trying to go through Paragraph 11 as you requested.

The next paragraph says on February 23, 2005, the Defendant filed a nonresponsive brief opposing

reconsideration. I will state for the record that although Plaintiffs believe it was nonresponsive, I didn't find it to be nonresponsive, I thought it was an appropriate brief.

The next paragraph says that on February 23, 2005, Plaintiff filed a reply to answer and affirmative defenses.

Next paragraph says that on February 28, 2005, Plaintiff filed a reply raising Defendant's nonresponsiveness.

The next paragraph states that on March 1, 2005, the Court ordered the parties to appear for oral argument on March 10, 2005.

I do recall ordering that and I do recall counsel appearing for oral argument. The reason I scheduled oral argument was to try to be helpful to the parties, and particularly to be understanding of Plaintiffs' counsel and to try to explain in as genteel a way as I could that some of these pleadings appeared to be unorthodox and didn't seem to be entirely appropriate. But I wanted to get the parties together and counsel for the parties together to try to manage the way in which this case was proceeding because it appeared to me that the parties were not connecting with one another. So that was the reason I scheduled oral argument.

Two days later on March 3, 2005, Plaintiff filed for an extension of time to appeal. That made no sense to the Court because the case was in its infancy, there was no final order entered, and it appeared to me to be, quite frankly, a

frivolous pleading.

For that reason, on March 8, 2005, I entered a --

MS. CHAJKOWSKI: Your Honor, before you go, to respond to the frivolous aspect. That was because if we -- if the Court had granted an extension of time to appeal, I would have held the Third Circuit appeal until we litigated the ERISA issue because I, based on the written information that I had received from the Defendant, they didn't respond to all the written requests I asked for, including the first denial letter, I had to get that from another source.

But the fact is, I don't believe there -- I believe either we don't have the right Defendant or there's more than one Defendant or there's some issue about the ERISA, whether ERISA applies or not. If ERISA is void because of various factors that aren't in place that should be in place, then an extension of time to appeal would have permitted me to bring bad faith back in, litigate it before the same judge in the same court on the same operative facts. But when the Plaintiff was denied that opportunity to have an extension to appeal, there was no other choice but to appeal to the Third Circuit for an en banc review.

Barber is a bad faith statute which is quasi-criminal. The fact is it may be that the Third Circuit panel erred in applying it at all to insurance because the Miller case was a statute that was not bad faith at all, it

had to do with the rights and duties of the parties to third parties or whatever.

In this case you are talking bad faith. Bad faith civil enforcement takes off the burden of the law enforcement to enforce things like that. It gives people a remedy on a preponderance of evidence standard instead of going through machinations of a criminal type of thing where the standards are different and the disadvantaged parties are more aggrieved because it takes longer. But I just needed to enter that for the record, that that was not a frivolous request.

THE COURT: All right. I guess everything that we just heard buttresses my prior statement and I will leave it at that.

Next entry is that on March 8, 2005, the Court entered an order denying an uncontested request for extension. I don't have any reason to believe that Mr. Fagan didn't file any opposition to the extension of time to appeal, and I guess it was my view that because that was such an unorthodox and frivolous pleading, that I didn't need to wait for Mr. Fagan's client to incur the time and expense to tell me that.

But I will give you a chance, Mr. Fagan, to speak to that issue, because in Paragraph O Ms. Chajkowski seems to be complaining that I didn't give you an opportunity to respond to her motion for extension of time to appeal.

MR. FAGAN: On behalf of my client, we concur in

the Court's position that the whole process seems to be a little bit jumbled by unconventional filings, and that was one of them, filing the extension of time to appeal. We were immediately aware and concerned that it was an interlocutory order, and we expected that the Court would deal with it appropriately, which the Court did.

We didn't feel that we had to file necessarily -- and take the time and effort to respond to what amounted to kind of baseless motions that are really just spinning everybody's wheels here. This is preventing the case from going forward, which I expect that's what the Plaintiffs want to do. And if they just kind of reel back a little bit and let this case proceed, we can probably get it resolved or -- either through settlement or through the normal court process.

THE COURT: All right. The next entry is that on March 8, 2005, Plaintiff filed a notice of appeal. And I do recall that being filed with the Court of Appeals for the Third Circuit.

On March 10, 2005, the parties appeared before the Court from 4:25 to 4:40 p.m., according to this Paragraph Q, and it also says that the Court granted Plaintiffs' request to amend within 30 days.

I do recall that oral argument when I tried as best I could to explain to Plaintiffs' counsel what I have tried to explain during this call to no avail. But I do recall the

request was made by Plaintiffs' counsel for the opportunity to amend the complaint, and I indicated at that time that I would grant amendment to the complaint because leave to amend should be freely granted. I also recall that it was my understanding that, based upon my discussion with counsel at that oral argument, that the inappropriate appeal to the Third Circuit was going to be withdrawn.

On March 11th, 2005, the Court entered an order denying the petition to vacate the order of February 1, 2005. That was done for the reasons stated on the record at the oral argument.

Then on April 8, 2005, Plaintiff filed a petition for extension of time to amend. Upon receiving that extension, the Court believed then and continues to believe now a few weeks later that it would be a miscarriage of justice to require the Defendant to spend the money and expend the time necessary to respond to that. Because the case is pending with the Court of Appeals for the Third Circuit, despite my entreaties to Plaintiffs' counsel at the hearing that that should not be the case, I decided that it would be unfair to the Defendant to enter an order giving Plaintiffs an open-ended extension of time to respond all the way until -- I am sorry, not an open-ended time to respond, but an open-ended time period to amend the complaint until the 30 days or 20 days after the Third Circuit rules on the appeal, I thought

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that would be rewarding the Plaintiff for litigation conduct that seemed to me to be inappropriate. So for that reason I entered the order of April 13th, 2005.

Then finally Plaintiffs filed this petition for reconsideration. And when I received the petition for reconsideration, I thought the most prudent and fair thing to do for all parties involved was to schedule this conference call because the pattern of unorthodox motions being filed continues without abatement, and I'm doing the best I can during this call to explain to both sides how I see this case.

And where we stand essentially is that Ms. Chajkowski has made clear that she wants to pursue her appeal to the Third Circuit. I am -- I've said my piece on that issue and I'm not going to say any more because I don't want to in any way browbeat counsel.

But I will state that because the case is pending with the Court of Appeals, that I'm not going to entertain any motions filed by either party. I'm telling both Mr. Fagan and Ms. Chajkowski that I don't want to get any motions on this case, I will not entertain any motions on this case during the pendency of the appeal to the Third Circuit. After the Third Circuit makes its decision relative to the appeal that's pending, then I will be happy to revisit the issues raised in this case.

So with that being said, I'll give Ms. Chajkowski an

opportunity to say anything further that she wishes.

MS. CHAJKOWSKI: Your Honor, could you ask or order them to send a copy of that contract that is referred to and the ERISA language they rely on to establish that they are in fact a party in interest here?

THE COURT: Again, Ms. Chajkowski, I don't think you can have it both ways. If you want that contract and you want other discovery from Mr. Fagan, I would be happy to order it, order him to produce it if he doesn't produce it voluntarily pursuant to Rule 26. But I'm only going to do that if there's not an appeal pending. You've indicated previously on this call that you want to pursue the appeal.

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MS. CHAJKOWSKI: I want to finalize subject matter jurisdiction.

THE COURT: Well, Mr. Fagan has already conceded subject matter jurisdiction, and the Court believes that there is subject matter jurisdiction under ERISA. So I did have subject matter jurisdiction over your case until you took jurisdiction away from me by sending the case to the Court of Appeals.

Is there anything else you would like to add, Ms. Chajkowski?

MS. CHAJKOWSKI: No, I would like to hear from the Defendant.

THE COURT: Anything you would like to say at this

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time, Mr. Fagan?

MR. FAGAN: I think we have said enough, Your Honor. I think you have tried to explain the posture of the case and I think you've done a fine job of doing that, and we are where we are because of Plaintiffs' actions. Once this case gets back on track after the appeal, we can engage in all the discovery and everything else that we need to do.

THE COURT: All right. Thank you, folks, have a good afternoon.

MR. FAGAN: Thank you, Your Honor.

MS. CHAJKOWSKI: Thank you.

(Record closed).

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C E R T I F I C A T E

I, Richard T. Ford, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Richard T. Ford

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No. 05-_____

In The

Supreme Court of the United States

DONNA SCHEIBLER, and
WILLLIAM SCHEIBLER, her husband,
Insured/Plaintiff,
Petitioner,

v.

HIGHMARK BLUE SHIELD,
Insurer, defendant,

THOMAS J. HARDIMAN,
United States District Court Judge,

Respondents.

On Petition for *Writ of Certiorari* to the
United States Court of Appeals for the Third Circuit

Appendix II – Petitioner Pleadings

Mary Ellen Chajkowski, Esquire
Petitioner's Counsel of Record
Pennsylvania ID# 86611
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

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Appendix II – Petitioner Pleadings

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs, :
Vs. :
:
HIGHMARK BLUE SHIELD
Defendant.

COMPLAINT IN CIVIL ACTION

AND NOW come the Plaintiffs, Donna Scheibler and William Scheibler, her husband, by and through their attorney, Mary Ellen Chajkowski, Esquire, and file the within Complaint and represent the following in support thereof:

1. This action is brought under, and jurisdiction is vested in this Court through, the Employee Retirement Security Act (ERISA), and specifically, 29 U.S.C. s1132(a)(1)(B), and a Pennsylvania state law claim.

2. The Plaintiff, Donna Scheibler, is an adult individual and resides at RD #2, Box 468, Greensburg, PA 15601, Westmoreland County.

3. The Plaintiff William Scheibler, husband of Donna Scheibler, is an adult individual, resides at RD #2, Box 468, Greensburg, PA 15601, Westmoreland County.

4. Plaintiff, Donna Scheibler, as an employee of ABB, Inc., is enrolled as a beneficiary of the company's health care benefits plan. William, as her husband, is entitled to the benefits of the health care plan.

5. Plaintiff, Donna Scheibler, selected the Highmark Blue Shield coverage, which is one of the health plans that ABB, Inc., offers to its employees.

6. Defendant, Highmark Blue Shield, is an employee benefits plan insurer in the State of Pennsylvania and maintains an address for its Member Grievance & Appeals Department at P O Box 535095, Pittsburgh, PA 15253-5095.

6. The Defendant, Highmark Blue Shield, does business in Pennsylvania and is headquartered at Fifth Avenue Place in Pittsburgh, PA 15222.

7. At all times relevant hereto, the Defendant, Highmark Blue Shield, provided health care insurance pursuant to an employee benefit plan on behalf of the Plaintiff, Donna Scheibler.

8. William Scheibler was diagnosed with cancer and underwent radiation treatments in 1997 after a radical neck dissection.

9. William Scheibler's treating physicians wrote letters to Defendant, Highmark, attributing William Scheibler's need for oral surgery to the extensive radiation treatments that were administered for his tonsillar carcinoma stating that the surgery is medically necessary. In a letter to the Defendant Insurer, Dr. Stephen Rendulich attributed William Scheibler's caries to *xerostomia:*

"Radiation induced caries should be treated as a late effect medical condition resulting from radiation therapy. Having hyperbaric oxygen prior to dental extractions would significantly decrease his risk of *osteoradionecrosis*, which, as you know, can be quite extensive in nature, resulting in the loss of jaw and significant dysfunction and deformity, requiring multiple operations to correct."(Exhibit **A,** p. 3a).

10. Defendant, Highmark, approved payment of William Scheibler's pre-op and post-op, Hyperbaric Oxygen treatments, which were done anticipating the surgery.

11. Defendant, Highmark, denied payment for the scheduled surgery.

12. After Plaintiffs received a denial for the surgical procedure; Donna Scheibler sent a letter of appeal to the Defendant, Highmark, which included letters from William Scheibler's treating physicians, relating the medical necessity for surgery to his extensive radiation treatments.

13. Defendant relied upon unspecified plan language to deny coverage.

14. Defendant, Highmark, provided a 2003 draft copy of its plan, in response to a written request from Plaintiff's counsel.

15. William Scheibler's surgery was delayed for a period of months but eventually proceeded as planned and the surgery was performed.

16. The Plaintiffs negotiated with the hospital and paid an agreed upon price for the surgery but later received statements that far exceeded the costs actually paid.

17. Plaintiffs reasonably believe that the Defendant insurer may have benefited by denying coverage to its insured, William Scheibler, for payment of his hospital costs and later accepting reimbursement in excess of the agreed upon payment actually made.

18. Plaintiff reasonably drew the conclusion in paragraph 17 because the physician cost for doing the surgery

remained the same, whether covered by insurance or paid by the Plaintiff.

19. The Plaintiffs have exhausted all of their administrative appeals.

COUNT I
Employee Retirement Income Security Act (ERISA), 29 U.S.C. s1132(a)(1)(B)

20. Plaintiffs incorporate the allegations of paragraphs 1 through 19 as if set forth here at length.

21. Under the above circumstances, the Plaintiffs are entitled to recover benefits due them under the terms of the plan, to enforce the rights under the terms of the plan, and to clarify the rights to future benefits under the terms of the plan. (ERISA), 29 U.S.C. s1132(a)(1)(B).

22. While said policy was in full force and effect, William Scheibler requested approval of benefits for his oral surgery, a procedure, which was recommended by his treating physician as medically necessary.

23. All conditions precedent under this policy have been performed by the Plaintiffs, Donna J. Scheibler and her husband, William Scheibler.

24. Defendant has failed to pay the Plaintiffs the sum of money due under the policy.

Wherefore, the Plaintiffs demand judgment against the Defendant for the reimbursement of medical care, plus interest, cost and attorney's fees, due and owing them for the wrongful denial of coverage for William Scheibler's 2004 surgical procedures.

COUNT II

Pennsylvania Bad faith Statute, 42 Pa. C.S.A. s8371.

25. Plaitiffs incorporate the allegations of paragraphs 1 through 24 as if set forth here at length.

26. The Pennsylvania Bad faith Statute, 42 Pa. C.S.A.s8371, regulates the insurance industry mandating accountability on the part of all insurance companies for any frivolous or unfoûnded refusal to provide coverage in accordance with an applicable policy of insurance.

27. The Plaintiffs aver that the Defendant acted in bad faith in its actions toward them in handling the claim generally, and as set forth in the following particulars:

(A) In failing to consider all relevant factors and medical records to evaluate and determine the medical necessity of the surgery recommended by Willliam. Scheibler's treating physicians;

(B) In failing to properly inform Mr. Scheibler of what constitutes medical necessity and why it believed his condition did not rise to that level;

(C) In failing to appreciate the success of the surgery, as evidence of the necessity of the procedure;

(D) In failing to pay for a covered benefit given the medical evidence presented.

Wherefore, the Plaintiffs request, pursuant to 42 Pa. C.S.A. s8371, an award of punitive damages, court costs and counsel fees to be paid by the Defendant, Highmark.

Respectfully Submitted,
/s/ Mary Ellen Chajkowski, Esquire

December 23, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

:

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband, :
Plaintiff(s), :

v.

HIGHMARK BLUE SHIELD,
Defendant(s).

PLAINTIFFS' MOTION TO DENY DEFENDANT'S MOTION TO DISMISS

AND NOW come the Plaintiffs, Donna Scheibler and William Scheibler, her husband, by and through their attorney, Mary Ellen Chajkowski, Esquire, hereby opposing Defendant's Motion to Dismiss Plaintiffs' Count II claim for violation of the Pennsylvania Bad Faith Statute, 42 Pa. C.S.A. Section 8371; and moves this Honorable Court to deny Defendant's Motion to Dismiss, representing the following in support thereof:

PLAINTIFF'S MATERIAL FACTS

1. Defendant referred to various paragraphs of Plaintiff's Complaint,but made no reference to Plaintiff's material factual/legal allegations

(quoted here from Complaint by paragraph #):

5. Plaintiff, Donna Scheibler, selected the Highmark Blue Shield coverage, which is one of the health plans that ABB, Inc., offers to its employees.

8. William Scheibler was diagnosed with cancer and underwent radiation treatments in 1997 after a radical neck dissection.

9. *William Scheibler's treating physicians wrote letters to Defendant,Highmark, attributing Wm. Scheibler's need for oral surgery to the extensive radiation treatments that were administered for his tonsillar carcinoma stating that the surgery is medically necessary.* In a letter to the Defendant Insurer, Dr. Stephen Rendulich attributed William Scheibler's caries to *xerostomia:*

"Radiation induced caries should be treated as a late effect medical condition resulting from radiation therapy. Having hyperbaric oxygen prior to dental extractions would significantly decrease his risk of *osteoradionecrosis*, which, as you know, can be quite extensive in nature, resulting in the loss of jaw and significant dysfunction and deformity, requiring multiple operations to correct." (Ex. **A,** p. 3a).

11. Defendant, Highmark, denied payment for the scheduled surgery.

12. After Plaintiffs received a denial for the surgical procedure; Donna Scheibler sent a letter of appeal to the Defendant, Highmark, which included letters from William Scheibler's treating physicians, relating the medical necessity for surgery to his extensive radiation treatments.

13. Defendant relied upon unspecified plan language to deny coverage

14. Defendant, Highmark, provided a 2003 draft copy of its plan, in response to a written request from Plaintiff's counsel.

15. William Scheibler's surgery was delayed for a period of months but eventually proceeded as planned and the surgery was performed.

18. Plaintiff reasonably drew the conclusion in paragraph 17[1] because the physician cost for doing the surgery remained the same, whether covered by insurance or paid by the Plaintiff.

21. Under the above circumstances, the Plaintiffs are entitled to recoverbenefits due them under the terms of the plan, to enforce the rights under the terms of the plan, and to clarify the rights to future benefits under the terms of the plan. (ERISA), 29 U.S.C. 1132(a)(1)(b).

22. While said policy was in full force and effect, William Scheibler requested approval of benefits for his oral surgery, a procedure which was recommended by his treating physician as medically necessary.

23. All conditions precedent under this policy have been performed by the Plaintiffs, Donna J. Scheibler and her husband, William Scheibler.

24. Defendant has failed to pay the Plaintiffs the sum of money due under the policy.

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[1] *17.* Plaintiffs reasonably believe that the Defendant insurer may have benefited by denying coverage to its insured, William Scheibler, for payment of his hospital costs and later accepting reimbursement in excess of the agreed upon payment actually made.

Wherefore, the Plaintiffs demand judgment against the Defendant for the reimbursement of medical care, plus interest, cost and attorney's fees, due and owing them for the wrongful denial of coverage for William Scheibler's 2004 surgical procedures.

2. Defendant filed a Motion to Dismiss Count II based on pre-emption.

26. The Pennsylvania Bad faith Statute, 42 Pa. C.S.A. s 8371, regulates the insurance industry, mandating accountability on the part of all insurance companies for any frivolous or unfounded refusal to provide coverage in accordance with an applicable policy of insurance.

3.Plaintiffs hereby Petitions this Honorable Court to Deny Defendant's Motion to Dismiss Plaintiff Count II.

I. The parties have insurance-contract privity:

A) Plaintiffs have standing;

B) This court has exclusive jurisdiction over the claims;

C) Defendant drafted the terms of Plaintiffs' insurance coverage/exclusions/costs and it issues decisions to grant or deny payment to Plaintiffs, which must be narrowly construed in favor of the Plaintiffs.

II. The Savings Claus expressly reserves regulation of insurance to state law:

A) Congress did not intend to supplant state "bad faith" insurance regulations;

B) ERISA, Department of Labor, and state "bad faith" insurance regulations share a common interest in protecting contractually defined benefits,

C) Under 42 Pa. S3871, all insureds are a protected class of persons whether the insurance contracts are under ERISA or not.

III. Public Policy Interest (state economic burden - uninsured/underinsured)

A) Defendant did not comply with ERISA regulations in shifting its burden to pay;

B) Defendant's shortfalls are supplemented by state subsidy and reimbursements.

WHEREFORE, state regulation of insurance is expressly exempt from preemption by the ERISA Savings Clause, where it *affects* the risk pooling arrangement between the insurer and insured. Kentucky Ass'n of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 [30 EBC 1129] (2003). The Third Circuit noted that the United States Supreme Court in Miller articulated a two-part test which satisfies the savings clause if both prongs are met; and that Section 8371 satisfies the first, as it regulates insurers conduct by imposing industry-wide conditions on the insurance business. Barber v. Unum Life Ins. Co. of America, 383 F 3d 134 (3rd Cir. 2004) The risk pooling arrangement between insurer and insured in Barber can be materially distinguished from the risk pooling arrangement between Highmark and Plaintiffs. 42 Pa. CSA s8371 regulates and enforces an important state interest, as the state subsidizes losses of medical coverage insurers. Plaintiffs hereby petition this Honorable Court to accept all factual allegations in the Complaint and all reasonable inferences to be drawn therefrom in the light most favorable to the Plaintiffs and to deny Defendant's Motion to Dismiss Count II.

Very truly yours

January 24, 2004

/s/Mary Ellen Chajkowski, Esquire